IN THE COURT OF APPEAL AT NAIROBI

(CORAM: W. KARANJA, GATEMBU & NYAMWEYA, JJ.A.)

CIVIL APPEAL (APPLICATION) NO. E263 OF 2021

BETWEEN

JOHMAT DISTRIBUTORS LIMITED.....APPELLANT

AND

CENTRAL BANK OF KENYA.....RESPONDENT

(Being an application for the certification and leave to appeal to the Supreme Court against the judgment of this Court ***(SG Kairu, Tuiyott, & G.W.N. Macharia JJ. A.)*** *dated 20th September 2024 in* ***NAI Civil Appeal No. E263 of 2021,***

in an appeal against the Judgment of the High Court of Kenya at Nairobi ***(Odunga, J.)*** *(as he then was) dated 18th December 2019 in* ***HCCC No. 204 of 2004)***

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RULING OF THE COURT

1. This ruling is on an application lodged by Johmat Distributors Limited (the applicant) on 8th October 2024, and arises from the judgment delivered by this Court (S. Gatembu Kairu, F. Tuiyott, &

G.W.N. Macharia JJ.A.) on 20th September 2024 in **Civil Appeal E263 of 2021.** The applicant herein, who was the appellant in the said appeal, is seeking leave to appeal against the said judgment to the Supreme Court, and also prays that pending

the hearing and determination of the intended appeal, this Court issues an order for stay of execution against the said judgement. The

application is expressed to be premised on **Article 159(2) (a), (d)** and **(e), 163(4)(b)** and **259(1)** of the **Constitution**, **Section 3(2), 3A** and **3B** of the **Appellate Jurisdiction Act, Rule 47** of the **Court of Appeal Rules, Rule 33(1)** of the **Supreme Court Rules**.

2. To place the application in proper perspective, we give a brief background of the matter that culminated into the application before us. Central Bank of Kenya (the respondent herein) by a plaint dated 17th April 2004 and further amended on 27th February 2004 sued Giro Commercial Bank Limited, Jignesh Desai, Alex Rebiro Ngugi alias Aba Mpesha T/A Mpesha Enterprises and Johmat Distributors Limited (the applicant) in **HCCA No. 204 of 2004**, and sought: a declaration that Giro Commercial Bank Limited, Jignesh Desai and Alex Rebiro Ngugi alias Aba Mpesha T/A Mpesha Enterprises and the applicant are liable for the loss suffered by the respondent; the sum of Kshs. 205 million be paid by Giro Commercial Bank Limited as the constructive trustee of the respondent; and/or in the alternative, judgement be entered jointly against Giro Commercial Bank Limited, Jignesh Desai and Alex Rebiro Ngugi alias Aba Mpesha T/A Mpesha Enterprises and the applicant in the sum of Kshs. 205 million for their separate involvement in the fraudulent

acquisition and transfer of the proceeds from the Treasury Bonds rightfully belonging to the respondent; interest at bank rates from

the date of payment of the said amount until payment in full; costs of the suit; and any other relief the court deemed fit to grant.

3. However, the suit was withdrawn against Giro Commercial Bank Limited, Jignesh Desai and Alex Rebiro Ngugi alias Aba Mpesha T/A Mpesha Enterprises and only proceeded between the applicant and the respondent.

4. The applicant filed a defence and counterclaim dated 4th June 2007 and prayed that it was entitled to general and aggravated damages and loss of interest on the deposit from 22nd July 2003.

5. In dismissing the respondent's case against the applicant, the learned Judge (Odunga, J. (as he then was)) found that the case against the applicant was based merely on suspicion. Regarding the applicant's counterclaim and claim on loss of interest, the trial court found no merit in the claim, and altogether dismissed the applicant's claim against the respondent.

6. Aggrieved by the judgment of the High Court, the applicant lodged an appeal in this Court seeking to partially set aside the learned Judge's judgement that declined to award interest and

costs to the applicant; that this Court enters judgment in favour of the applicant for interest on the sum of Kshs.14,000,000.00 at commercial rate compounded from the date the sum was seized to

the date the same was released to the applicant and costs of the suit.

7. In dismissing the applicant's appeal, this Court found on the issue of interest that **section 26** of the **Civil Procedure Act** is instructive that the award of interest is payable at such rates as the court deems fit. That an award of interest is, therefore, a discretion of the court. The Court found that according to **section 26**, interest is payable where the subject matter is a decree for money which is the principal sum adjudged. The Court held, further, that it cannot be said that there was a definitive principal sum that was to be adjudged as the withheld amount of Kshs.14,000,000.00 had been released to the applicant, hence there was nothing else to be adjudged for the trial court to exercise its discretion in awarding interest. This Court held that in the premises, it behooved the applicant to lead evidence on the interest it supposes that it was entitled to.

8. The Court found that the approach taken by the learned Judge, was neither abhorrent nor aberrant in view of the fact that there was no evidence led on the issue of interest. The Court found that the applicant had failed to prove the rate of interest which it was entitled to, and its claim not being a liquidated one, it was not up to the trial court to make that decision for it.

9. On the issue of costs this Court held that it was unable to find the point of departure from the finding of the trial court on the issue of costs and held as the trial Judge did, that since neither of the claims of the parties before him succeeded, it would not make judicial sense to award costs to one party, to the detriment of the other. This ground on costs failed and the applicant's appeal was found to be devoid of merit and dismissed in entirety with costs of the respondent.

10. Aggrieved by the above findings, the applicant filed the application now before us. The application premised on the grounds on its face and is supported by an affidavit sworn by the applicant on 8th October 2024, wherein he gives a detailed background to the appeal before this Court, and states that it is in the interest of justice and in the public interest for the Supreme Court to determine the questions in the intended appeal, which he has framed as follows:-

> ***"(i) Whether the grant of Mareva injunction infringes on the defendant's constitutional rights as enshrined in Article 2(6), 19, 20, 25(c), 27(1), (2)(a), (b) and 50(1) of the Constitution and if so, what is the cure?***
> ***(ii) To whom is a Mareva Injunction granted, or is it merely an illusionary to damages or a shield against an unmerited order?***
> ***(iii) Does the court's refusal to enforce an undertaking given in a case have a ripple effect on litigation, legal practice and on commercial contracts and what is the***

future

of undertakings in light of the court's judgement?

(iv) Whether there are principles that must be strictly followed by the court in denying Mareva defendant damages?

(v) Whether documents in a Record of Appeal which are exempted under rule 89 of the Court of Appeal Rules, 2020 (sic) can constitute a basis of dismissing an appeal and the court citing inability to decide despite there being enough material with which to make a reasonable judgement and whether this offends Article 159(d) of the Constitution?

(vi) Are costs purely dependent on the discretion of the Judge. Does the time taken to prosecute the matter, expense and time involved matter?"

11. The applicant averred that the matter is of public importance particularly on cases where the court is called upon to issue a Mareva injunction thereby arbitrarily curtailing the exercise of rights of a person not party to the suit.

12. The applicant's advocates on record reiterated these grounds in

the written submission dated 24th October 2024.

13. The respondent opposed the application by way of a replying affidavit sworn by Kennedy Kaunda Abuga, general counsel of the respondent dated 20th November 2024 wherein he stated that there is no ground that has been set to demonstrate that the matter is of public interest, and that the application does not meet the requisite threshold for certification for the reasons

that; the issues raised by the applicant in the application are the Mareva

injunction that was issued by the trial court and damages arising out of the Mareva injunction; that the applicant raises issues of enforcement of an undertaking, documents exempted from a record of appeal under **rule 89** of the **Court of Appeal Rules** and award of costs; the applicable law and legal regime for award of costs in the **Civil Procedure Act** and **Rules** where courts are allowed to exercise discretionary powers when awarding costs; that the unawarded interest as claimed by the applicant is a matter of fact that is governed by the **Evidence Act**; and that the issue that the court disregarded and refused to enforce an undertaking given by the respondent does not constitute a matter of general public importance.

14. Finally, it was deponed that the application has been filed out of time contrary to **Rule 42(b)** of this Court's **Rules, 2022** which prescribes fourteen days after delivery of the judgement.

15. The respondent's advocates on record filed submissions dated 20th November 2024 and urged that the application does not meet the threshold and criteria contemplated by **Article 163(4)(a)** and **(b)** of the **Constitution** and **section 15B** of the **Supreme Court Act**, **2011** and more particularly and categorically enunciated in the *locus classicus* case of ***Hermanus Phillipus Steyn -vs- Giovanni Gnecchi-Ruscone[2013] eKLR***. It was submitted that the

applicant has not demonstrated in the application that the matters in question carry specific elements of real public interest and concern so as to justify the Supreme Court's intervention under **Article 163(4)(a)** and **(b)** of the **Constitution**.

16. The above averments and submissions were reiterated at the hearing on this Court's virtual platform on 17th March 2025 by learned counsel Mr. Maina Njuguna, for the applicant, and Mr. Oraro, learned Senior Counsel for the respondent.

17. On the issue as to whether or not the application was filed out of time without leave of the court, our view of the matter is that the application was filed within time. We say so because **Rule 41(2)** of the **Court of Appeal Rules** states as follows:

> ***"An application seeking certification that a matter of general public importance is involved shall be made within 30 days after delivery of the decision."***

18. Accordingly, we find no merit in that objection as the application was filed within 30 days.

19. As to whether the intended appeal to the Supreme Court raises a matter of General Public Importance to warrant certification pursuant to **Article 163(4)** of the **Constitution**, the Supreme Court succinctly defined what amounts to a matter of general public importance in ***Hermanus Phillipus Steyn -vs-***

Giovanni

Gnecchi Ruscone**,** (*supra*) as follows:

"…a matter of general public importance warranting the exercise of the appellate jurisdiction would be a matter of law or fact, provided only that: its impacts and consequences are substantial, broad-based, transcending the litigation-interests of the parties, and bearing upon the public interest. As the categories constituting the public interest are not close, the burden falls on the intending appellant to demonstrate that the matter in question carries specific elements of real public interest and concern."

20. The Supreme Court further enunciated the principles to guide the courts in determining whether a matter of general public importance as follows:

> ***"(i) For a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;***
> ***(ii) where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest;***
> ***(iii) such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination;***
> ***(iv) where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;***
> ***(v) mere apprehension of miscarriage of justice, a matter most apt for resolution in***

the lower

superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of Article 163(4) (b) of the constitution;

(vi) the intending applicant has an obligation to identify and concisely set out the specific elements of general public importance which he or she attributes to the matter for which certification is sought;

(vii) determination of facts in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court."

21. Applying the above criteria, we are not persuaded that the issues in raised by the applicant transcend the circumstances of this case, and have a significant bearing on public interest. The gist of the applicant's complaint is whether or not the applicant was entitled to interest on the amount that was frozen in the bank for 14 years and costs, his suit before the High Court having been dismissed. There is also the question on whether the undertaking given by the respondent covered paying the said interest for the term the amount was frozen. Clearly, those were circumstances that were peculiar to that specific suit and cannot be said to transcend beyond the parties in the suit.

22. The Supreme Court's guidance is that matters of general public importance are those that, *inter alia,* raise a substantial point of law, or occasion a state of uncertainty in the law or arise from

contradictory precedents, or will affect a considerable number of persons in general, or as litigants.

23. There is no doubt the applicant is aggrieved by what it considers as lost use of its money for 14 years pending the conclusion of the case, and it may feel that it was exposed to injustice when the Court declined to award interest for those years. However, as expressed by the Supreme Court in ***Hermanus Phillipus Steyn - vs- Giovanni Gnecchi-Ruscone*** [supra].

> ***"Mere apprehension of injustice, or miscarriage of justice, is not a basis for certification as a matter of general public importance."***

The Supreme Court reiterated this finding in ***Malcolm Bell - vs- Daniel Toroitich arap Moi & Another*** ***[2013] eKLR***, where it held:-

> ***"A matter of general public importance must transcend the circumstances of the particular case. It is not enough that a party fears injustice in his or her cause."***

See also ***Peter Oduor Ngoge -vs- Francis Ole Kaparo & 5 Others*** ***[2012] eKLR***. We hold the view that this application does not meet the criteria set above to qualify for certification to be escalated to the Supreme Court.

24. On the outstanding prayer for stay of execution of this Court's

judgment, this Court has no jurisdiction to grant such an order under **Rule 5(2)(b)** of the **Court of Appeal Rules**, which is the

operative law. It was held in this respect by this Court in ***Dickson***

Muricho Muriuki -vs- Timothy Kagondu Muruiki & 6 others ***(2013) eKLR*** that **Rule 5(2)(b)** confers power to this Court

to hear interlocutory applications pending the hearing and determination of the main appeal before it, and does not confer power to this Court to entertain any application on the merits or otherwise of a suit after judgment. We are in agreement with this holding.

25. The applicant's Notice of Motion application of 8th October 2024 fails in its entirety and is dismissed with costs to the respondent. It is so ordered.

Dated and delivered at Nairobi this 5th day of December, 2025.

W. KARANJA

.....
JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb. C.Arb.

.....
JUDGE OF APPEAL

P. NYAMWEYA

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.